

IN THE COURT OF APPEALS 4/22/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-01121 COA

ARTHUR R. TAYLOR, JR.

APPELLANT

v.

**SENATOBIA MOTOR INN, INC., PHILLIP CORRERO, JACK A. GOODMAN, AND
GERALD W. LINDSAY, INDIVIDUALLY AND AS DIRECTORS AND OFFICERS**

APPELLEES

**THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B**

TRIAL JUDGE: HON. DENNIS M. BAKER

COURT FROM WHICH APPEALED: TATE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

OMAR D. CRAIG

ATTORNEY FOR APPELLEE: MICHAEL STEPHEN MACINNIS

NATURE OF THE CASE: CIVIL

**TRIAL COURT DISPOSITION: CHANCELLOR DISMISSED THE COMPLAINT FILED BY
APPELLANT WITH PREJUDICE**

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

KING, J., FOR THE COURT:

On August 2, 1995, the Tate County Chancery Court dismissed the Appellant's complaint against the Appellees having found that Appellant had abandoned any interest in the disputed hotel property in the course of his Chapter 11 Bankruptcy proceeding, that Appellant's claims were barred by res judicata, waiver and abandonment, and that Appellant's filing of a Notice of Lis Pendens was unfounded as an attempt to enforce a property interest abandoned and relinquished by Appellant. On appeal, the Appellant argues that the chancellor's findings were erroneous and urges this Court to reverse. Finding merit in the Appellant's arguments, we reverse and remand this matter for a trial on the merits.

FACTS

In 1986, the Appellant, Arthur R. Taylor, Jr., (Taylor) and the Appellees, Senatobia Motor Inn, Inc., (SMI, Inc.) Phil Correro, Jack A. Goodman, and Gerald W. Lindsay individually and as officers and directors of the corporation entered into a contractual agreement. Pursuant to this agreement, the Appellees agreed to purchase and Taylor agreed to sell the restaurant and hotel property known then as the Senatobia Motor Inn. At the completion of the transaction, Appellees executed a promissory note in favor of Taylor in the amount of \$580,086.62 and interest of 9.25 per cent per annum to be paid quarterly as well as a deed of trust evincing Taylor's secured interest. The promissory note required that the note would become due and payable in its entirety upon the sale of the property or its refinancing. The parties also entered into a management contract whereby Taylor would manage the hotel business for a specified period of time.

In January 1987, Appellees, acting as SMI, Inc., and Taylor executed a subordination agreement, which made Taylor's deed of trust junior to a deed of trust executed by the Appellees for the benefit of Peoples Bank of Senatobia. This note was paid in full in March 1987. In February 1987, Appellees executed a deed of trust for the benefit of First American Bank of Memphis, Tennessee, to secure the sum of \$448,000.00.

Then in April 1987, Appellees, executed a promissory note and land deed of trust to Delta Life & Annuity Company in the sum of \$1,090,000.00. Taylor's deed of trust was subordinate to these subsequently executed deeds of trust. However, Appellees assured Taylor that some portion of the proceeds, received from Delta Life & Annuity, would be paid to him to satisfy the \$580,086.62 existing debt. Relying on these assurances, Taylor guaranteed the loan as a shareholder. However, Appellees did not settle their debt with Taylor as promised.

On July 1, 1987, Appellees filed suit against Taylor in the Chancery Court of the First Judicial District of Panola County. The bill of complaint demanded that Taylor give an accounting of his management and the business operation of the Senatobia Motor Inn (SMI). Appellees alleged that Taylor failed to pay various bills, totaling \$72,000.00, which were incurred by him during his ownership of SMI/HoJo. It was further alleged by Appellees that Taylor had appropriated for his own use and benefit certain property of SMI consisting of food and monies. The Appellees contended that their business and reputations had suffered irreparable harm and damage as a result of Taylor's action. Notwithstanding Appellees's acknowledgment of Taylor as a preferred stockholder and past president of the corporation, Appellees asked the court to issue a temporary restraining order and enjoin Taylor and his family from entering upon the business' premises.

On August 13, 1987, the court issued an agreed order pursuant to an agreement between the Appellees and Taylor. Pursuant to the agreed order, *inter alia*, Appellees would secure a second deed of trust to Taylor on the real property known as SMI/Howard Johnson hotel (SMI/HoJo) in lieu of the preferred stock in the sum of \$260,000.00. This order was contingent upon the first mortgage holder, Delta Life and Annuity, allowing Appellees a second mortgage or deed of trust on the property. Appellees failed to comply with the agreed order, and instead executed a deed of trust in favor of Leader Federal Savings and Loan Association as security for a note in the amount of \$180,000.00. Appellees never complied with the agreed order.

On January 17, 1989, Taylor filed for reorganization under Chapter 11 of the Bankruptcy Code. As required by the Code, he submitted a disclosure statement which listed his corporate ownership in SMI/HoJo in Senatobia, Mississippi. Specifically, the statement indicated that Taylor owned 150 shares of stock and that Delta Life & Annuity held a mortgage against the property for approximately \$1,090,000.00. Taylor acknowledged his guarantee of the \$1,090,000.00 corporate debt and the contingent liability for repayment in the instant that SMI, Inc. defaulted. In doing so, Taylor proposed to abandon his interest in SMI, Inc. to Delta Life & Annuity and discharge himself from all liability on the debt to Delta Life & Annuity. Subsequently, the Bankruptcy Court confirmed Taylor's reorganization plan.

On April 27, 1990, Taylor filed the complaint against Appellees alleging that they had failed to comply with the agreed order, which ordered Appellees to secure the second deed of trust in the amount of \$260,000.0 on the SMI/HoJo property. The complaint also alleged, *inter alia*, that Appellees had breached the original property purchase contract in the amount of \$580,086.62, and interest of 9.25 per cent per annum, and that Taylor had suffered severe emotional distress, mental anguish, loss of future earnings, and loss of future assets. Appellees filed a motion to dismiss alleging that Taylor had abandoned his interest in SMI/HoJo pursuant to the Chapter 11 bankruptcy; therefore, he did not have standing to bring the complaint. Appellees further alleged that any such interest would be that of the Bankruptcy Court for the Northern District of Mississippi and was barred by res judicata, waiver, estoppel, judicial estoppel and laches. After a hearing, the Chancery Court of Tate County dismissed the case under Rule 12(b)(6) holding that Taylor had abandoned any interest he had in the hotel property in the course of his Chapter 11 bankruptcy; that Taylor's claims were barred by res judicata, waiver, abandonment, estoppel, and judicial estoppel; and that Taylor's filing of the notice of lis pendens was unfounded. Taylor appeals the chancellor's ruling.

I.

DID THE CHANCERY COURT ERROR IN SUSTAINING APPELLEES' MOTION TO DISMISS PURSUANT TO MISS. RULE CIV. PRO. 12(b)(6) BY CONCLUDING THAT TAYLOR ABANDONED HIS INTEREST IN THE SENATOBIA MOTOR INN PROPERTY IN THE COURSE OF HIS CHAPTER 11 BANKRUPTCY PROCEEDINGS?

Pursuant to Rule 12(b)(6), a motion to dismiss tests the legal sufficiency of the complaint. Comment, Rule 12, Miss. Rules Civ. Pro. "To grant a 12(b)(6) motion, there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim."

Weeks v. Thomas, 662 So. 2d 581, 585 (Miss. 1995) (citing *Busching v. Griffin*, 465 So. 2d 1037, 1039 (Miss. 1985)); see also *Carpenter v. Haggard*, 538 So. 2d 776, 777 (Miss. 1989); *Martin v. Phillips*, 514 So. 2d 338, 340 (Miss. 1987). " [T]he pleaded allegations of the complaint must be taken as true and a dismissal should not be granted unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Overstreet v. Merlos*, 570 So. 2d 1196, 1197 (Miss. 1990).

Accepting the allegations of Taylor's complaint as true, we are not convinced beyond reasonable doubt that he is not entitled to relief. Appellees contend that the crux of this case is Taylor's alleged abandonment of his interest in SMI/HoJo to Delta Life & Annuity in the course of his bankruptcy proceedings. Appellees argue that Taylor's request to discharge his interest in the property constituted an abandonment of all rights and subsequent interest to that property. Thus, Appellees contend that Taylor is without standing to bring any claims against Appellees even for the purpose of enforcing a prior court rendered agreed order.

In support of this contention, Appellees rely on paragraph twelve of Taylor's Plan of Reorganization in Bankruptcy which states:

The only claim in this class is the secured claim of Delta Life & Annuity. The claim is estimated to be One Million Ninety Thousand Nine Hundred and Ninety Nine and No/100 Dollars (\$1,090,999.00) and is secured by a first mortgage lien position on a Howard Johnson hotel in Senatobia, Mississippi. This indebtedness is a corporate debt which the Debtor has personally guaranteed and, thus, the Debtor has a contingent liability for payment of the indebtedness. The Debtor would propose to abandon any interest he may have in the property to Delta Life & Annuity and discharge himself from any and all liability on the indebtedness to Delta Life & Annuity.

Appellees argue that Taylor's request to "abandon any interest he may have in the property" was a voluntary surrender of any claim to possession or intention of possession to the SMI/HoJo hotel. Therefore, surrender or abandonment of the property became absolute upon the confirmation of Taylor's Bankruptcy Plan, binding him to the provisions therein in any subsequent action. We cannot agree with the Appellees in this argument. "An abandonment of title must be "clear and unmistakable." *In re Robertson*, 72 B.R. 2, 3 (Bankr. D. Colo. 1985). Taking Taylor's pleaded allegations as true, we do not find that Taylor abandoned all of his interest in the SMI/HoJo hotel property. In fact, Taylor held multiple interests in the SMI/HoJo hotel property. One such interest was that of a shareholder in the corporate ownership of SMI, Inc., which consisted of 150 shares of stock. According to Taylor's Chapter 11 disclosure statements, he proposed to abandon this stock interest to Delta Life & Annuity to satisfy a contingent corporate debt of \$1,090,000.00 for which he acted as a personal guarantor on behalf of SMI, Inc. This is the interest that Taylor abandoned in bankruptcy.

The second interest was created pursuant to an agreed order entered in the Chancery Court of the First Judicial District of Panola County in 1987. The order provided that Appellees (Plaintiffs in that action) would obtain a second deed of trust in favor of Taylor (Defendant in that action), in the sum of \$260,000.00, in lieu of preferred stock, if the first mortgage holders' Delta Life & Annuity would

allow it. The Appellees never acquired this second deed of trust, which would have secured its indebtedness to Taylor for the original purchase of SMI/HoJo. The Appellees' failure to comply with the agreed order for the benefit of Taylor created a fact in support of his claim that he was entitled to relief.

The third interest was created by the original promissory note, executed by Appellees in favor of Taylor, for the purchase of SMI/HoJo in the amount of \$580,086.62 and interest. This interest remained even though Taylor was no longer a senior lien holder.

Appellees argue in the alternative that even if Taylor did not abandon his interest under paragraph 12 of the plan, Taylor's failure to list the agreed order as an asset in the disclosure statement constituted abandonment and waiver. Thus, Taylor would not have standing to bring an action against Appellees and the court cannot accord him any relief. On the other hand, Appellees also contend that "[a] bandonment is clearly limited to 'listed' property in the Bankruptcy Schedules." *In re Dulugopolski*, 67 B.R. 122, 123 (D. Kansas 1986). In the case sub judice, the only interest that Taylor "clearly and unmistakably" abandoned was his shareholder interest. Taylor listed this interest as "150 shares of stock in Howard Johnson hotel" throughout the bankruptcy schedules and debtor holding statements.

More important, Taylor retained title to property of the estate under the reorganization plan. Provision eight, of Article IV, of the reorganization plan provided:

After confirmation, title to the debtor's property will revert to the debtor and the jurisdiction of the court will cease, except as provided hereinabove. However, the reverting of title in the debtor shall not extinguish the rights and powers of the debtor, as debtor-in-possession, and all such rights and powers shall be transferred and assigned to the debtor so that it may prosecute and/or enforce the same after confirmation.

The dissent in this opinion is predicated upon Taylor's alleged lack of standing to pursue his claim. However, this reliance is misplaced under the facts of this case. Plainly, under the reorganization plan submitted to the bankruptcy court, Taylor retains interest pursuant to the original property purchase contract and the subsequent agreed order. Moreover, the reorganization plan granted Taylor the right to pursue a legal remedy to enforce and protect all rights and powers consistent with the property interest which reverted to him as the debtor-in-possession. This reorganization plan was approved by the bankruptcy court without exception.

Consequently, the court's granting of the Appellees' 12(b)(6) motion was premature, because it does not appear to a certainty that Taylor is not entitled to relief under the facts that he presented to support his claims. We, therefore, reverse and remand for a trial on the merits of Taylor's complaint.

II.

WAS TAYLOR'S FILING OF THE NOTICE OF LIS PENDENS UNFOUNDED AS SEEKING TO ENFORCE A PROPERTY INTEREST PREVIOUSLY ABANDONED AND RELINQUISHED?

We are of the opinion that our determination of Taylor's first assignment of error disposed of the need to address the validity of the notice of lis pendens. Therefore, we do not deem a discussion of this issue necessary.

III.

WAS TAYLOR'S CLAIM BARRED BY THE DOCTRINES OF RES JUDICATA, ABANDONMENT, WAIVER, ESTOPPEL AND JUDICIAL ESTOPPEL BY THE BANKRUPTCY PROCEEDING?

In granting the motion to dismiss, the chancellor found that Taylor's claims were barred as an attempt to relitigate matters previously disposed of between the parties and abandoned, surrendered and waived by Taylor in his bankruptcy proceeding. Ordinarily, "this Court will not disturb the chancellor's opinion when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Mount v. Mount*, 624 So. 2d 1001, 1004 (Miss. 1993); *Bowers Window and Door Co., Inc. v. Dearman*, 549 So. 2d 1309 (Miss. 1989); *Bullard v. Morris*, 547 So. 2d 789, 791 (Miss. 1989). In the present case, we find the chancellor's opinion manifestly wrong.

In the course of Taylor's bankruptcy proceedings he did not disclose the existence of a judgment obtained against the Appellees pursuant to an agreed order entered in the Chancery Court of the First Judicial District of Panola County. The agreed order was entered in the sum of \$260,000.00, but Appellees never satisfied this judgment debt. Appellees now contend that Taylor's claim is barred because he failed to disclose and litigate it during the bankruptcy. "While the Code calls for disclosure of claims, . . . , no Code provision requires that the debtor actually litigate in the bankruptcy proceedings any claim the debtor happens to have" *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 421 (3d Cir. 1988) (Stapleton, J. dissenting). Indeed, pursuant to the reorganization plan, Taylor reserved the right to institute, prosecute, and/or enforce, after confirmation any causes of action or claims which have not previously been instituted and/or enforced by the Debtor. Taylor has not previously enforced the agreed order, and the present case is not an attempt to relitigate Appellees' debt, merely enforce it.

The Appellees attempt to analogize several bankruptcy cases in which the court found the debtors' claims barred by res judicata, abandonment, waiver and estoppel. However, their attempt fails because in each of those cases the creditors had intervened in the bankruptcy proceedings to protect their rights as secured creditors. The debtors had an opportunity to raise the claims in defense of the creditors' claims, but did not. *See Oneida*, 848 F.2d at 419; *Little v. Smith*, 126 B.R. 861 (Bankr. N.D. Miss. 1991). In the present case, the Appellees are debtors of Taylor, not intervening creditors who sought to lift the automatic stay to protect secured claims. Because the Code does not mandate Taylor to pursue claims against debtors in bankruptcy proceedings, we cannot find that his failure to raise the present claims are barred by res judicata.

We also reject the Appellees' arguments concerning estoppel and judicial estoppel. Appellees insist that Taylor's failure to disclose the judgment debt as an asset in bankruptcy constituted an

inconsistent position in a prior judicial proceeding. We do not find that Taylor took an inconsistent position, and therefore we need not offer Appellees protection through estoppel. However, Taylor's failure to disclose the Appellees' judgment debt under the agreed order may very well constitute a fraudulent act against the bankruptcy court. While we leave that determination to the bankruptcy court, we cannot allow Appellees a windfall by disregarding the agreed order in regards to the \$260,000.00. Allowing Appellees to ignore the agreed order would create egregious prejudice and disadvantage Taylor's creditors. This is particularly so since the judgment would have been applied to the creditor's outstanding claims. Moreover, if Appellees were allowed to disregard the agreed order such would amount to a forfeiture, and equity abhors a forfeiture. *Citizens' Bank of Hattiesburg v. Grigsby*, 155 So. 684 (1934).

We find that the chancellor erred in determining that Taylor's claims were barred by res judicata, abandonment, waiver and estoppel. However, on remand we direct Taylor to notify the Bankruptcy Court of this opinion, and furnish appropriate proof of such notification to the trial court.

THE JUDGMENT OF THE TATE COUNTY CHANCERY COURT IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. THE APPELLANT IS INSTRUCTED TO NOTIFY THE BANKRUPTCY COURT FOR THE NORTHERN DISTRICT SO THAT IT MAY TAKE ANY ACTION IT FINDS NECESSARY TO PROTECT THE APPELLANT'S BANKRUPTCY CREDITORS' INTEREST. APPELLANT MUST PROVIDE THE CHANCERY COURT PROOF OF SUCH NOTIFICATION. ALL COST OF THE APPEAL ARE TAXED TO THE APPELLEES.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, AND DIAZ, JJ., CONCUR.

SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY MCMILLIN, P.J., HERRING AND PAYNE, JJ. HINKEBEIN, J., NOT PARTICIPATING.

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SOUTHWICK, J., dissenting

My disagreement with the majority is not total, but it is sufficient to cause me to dissent from the remedy ordered by the court.

I start by looking at what existed that could have been abandoned during the bankruptcy. The following are the notes and deeds of trust affecting the business at one time or another:

- 1) \$150,000 contract of sale for business dated 10/7/1986; \$1,250,000 contract of sale for real property. Neither resulted in promissory notes and are not assets. There was stock, however.
- 2) \$580,000 promissory note from Senatobia Motor Inn to Arthur Taylor, dated 12/19/1986, due when property sold. This note was secured by a deed of trust on the hotel. On 2/3/1987 this deed of trust was subordinated to a \$95,000 note & deed of trust to People's Bank; later Taylor released his deed of trust because of SMI's borrowing money from another lender, First American Bank. The note remained, but no security interest was retained in any property.
- 3) SMI executed a note and deed of trust to Delta Life & Annuity on 4/28/1987, for \$1,090,000; Taylor personally guaranteed the note. This is not an asset, only a liability.
- 4) Taylor had a right to a second deed of trust on the motel, arising from the agreed order of 8/13/1987; this replaced any right to preferred stock. The deed of trust was not executed. The debt was \$260,000.

The result of all this is that Taylor owned a \$580,000 note executed by SMI, with no right to a security interest, and the right to a deed of trust to secure a \$260,000 obligation. Taylor in his brief says these are two different debts -- that the \$260,000 is not the balance owed on the \$580,000. That appears to be true, as the \$260,000 note replaced the right to preferred stock, and does not impact the larger 1986 note.

In the bankruptcy plan, Taylor said:

The claim [against Taylor] is estimated to be ...(\$1,090,000) and is secured by a first mortgage lien position on a Howard Johnson Motel in Senatobia, Mississippi. This indebtedness is a corporate debt which the Debtor [Taylor] has personally guaranteed and, thus, the Debtor has a contingent liability for payment of the indebtedness. The Debtor would propose to abandon any interest he may have in the property to Delta Life & Annuity and discharge himself from any and all liability on the indebtedness to Delta Life & Annuity.

What is abandoned is interest in "the property," which in context I take to mean an interest in the same property upon which Delta Life & Annuity had a mortgage. What I do not think was abandoned was the right to be paid money by the corporate entities that signed the \$580,000 promissory note or the agreed order creating a \$260,000 debt. Those are not interests in the motel property that interfered with Delta's mortgage, but Taylor would have no right to enforce them against the property until he reduced his claim to judgment and sought to collect. Taylor proposed to abandon "any interest" in the *property* if he was discharged from liability on the indebtedness to Delta. He does not -- other than to mention stock -- say what the interest is, or even what "the property" is. The property is either the motel corporation or the real estate itself. More likely it is both. After this bankruptcy, Taylor may no longer have had a right to seek from SMI the deed of trust that was never executed. The point is somewhat academic, because even if Taylor had a right to a mortgage, it would have been subordinate to the earlier (1987) deed of trust executed to Delta securing the \$1,090,000 loan.

Where I diverge from the analysis employed by the majority is in the effect of finding this property was not abandoned. Though there are cases that reach different results, the result that seems most consistent with the statutes and also avoids getting too many different courts involved, is this:

(1) All nonexempt property of the debtor, scheduled or otherwise, becomes part of the bankruptcy estate. 11 U.S.C. § 541 (a)(1).

(2) All property of the bankruptcy estate "that is not abandoned under [section 554] and that is not administered in the case remains property of the estate." 11 U.S.C. §554(d). This is true even if the bankruptcy estate is closed. Thus unadministered, unabandoned assets are still in the bankruptcy estate. *Hester v Farmers Home Admin.* 49 BR 593 (E.D. Mo. 1985); *Re Harris*, 32 BR 125 (BC SD Fla., 1983). Both cases held that the bankrupt's unscheduled assets remained property of the bankruptcy estate after the bankruptcy proceedings were closed. Each case could be reopened to administer these assets. It is true that the plan of reorganization here specifically allows the debtor to retain all assets not sold or abandoned. This does not affect unscheduled assets, as allowing the parties to know what assets exist and what should be done with them is exactly what scheduling is supposed to permit. Thus the debtor, after informing all parties and the bankruptcy court what his

"assets" were, cannot now try to redefine "asset" to include other, unscheduled property. A decision about abandoning property no one knew about did not occur, and these assets remain within the estate subject to later resolution.

(3) Since they were not scheduled, the \$580,000 note and the right to \$260,000 remain in the bankruptcy estate, subject to being addressed by a motion by debtor or creditor or other interested person to reopen.

We have the obligation to determine whether the property was abandoned, and if it was abandoned, then to sort out the present rights to it. *Re Xonics*, 813 F. 2d 127, 129 (7th Cir. 1987). We should therefore decide that the property was not abandoned, that it remains in the bankruptcy estate, and can be addressed only by motions filed in that court. The bankruptcy jurisdiction continues and is exclusive.

This is somewhat inconsistent with a precedent cited to us. In that case the bankrupt was estopped from asserting claims that had not been scheduled, at least if they were central to the actions of the bankruptcy court. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F. 2d 414, 419 (3d Cir. 1988). The court made a point that the only issue was whether the debtor could himself raise a claim after bankruptcy when that claim predated the bankruptcy. *Oneida*, 848 F. 2d at 419. The court implied that if other creditors had been making the claim, the result may have been different. *Id.* The *Oneida* dissent focused on the fact that presumably innocent creditors were losing an asset, a result that made the debtor's earlier fraud more damaging than it need be. Neither the majority nor the dissent discusses the effect of 11 U.S.C. §§ 541 & 554, and whether the property was still in the bankruptcy estate.

We should affirm the dismissal of the case, but hold that the property was not abandoned, but remains in the bankruptcy estate. Any proceedings to address the overlooked/hidden assets must be brought in the bankruptcy proceedings. Whether either of the parties, Taylor or Senatobia, has an interest in notifying the bankruptcy court might be a legitimate question. Thus I would remand this case with instructions that Taylor notify the bankruptcy court of this opinion, and file a copy of that notice with the Tate County Chancery Court in this case file, with a copy to the chancellor.

McMILLIN, P.J., HERRING AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.